

HOUSE BILL 3353

By Curtiss

AN ACT to amend Tennessee Code Annotated, Title 4 and Title 12, relative to the state procurement commission.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 4, is amended by adding the following as a new, appropriately designated chapter:

4-\_\_-101. As used in this chapter, unless the context otherwise requires:

(1) "Bidder" means a legal entity that has properly registered with the chief procurement office;

(2) "Commission" means the procurement commission;

(3) "Council" means the advisory council on state procurement;

(4) "Grant" means any grant awarded to the state or awarded by the state, the furnishing by the state of assistance, whether financial or otherwise, to any person to support a program authorized by law. "Grant" does not include an award with the primary purpose of procuring an end product, whether in the form of supplies, services, or construction, or any contract resulting from such an award;

(5) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. It also includes all functions that pertain to the obtaining of any supply or service, including the description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration;

(6) "Services" means all services and agreements obligating the state, except services for highway and road improvements, which are governed by title 54;

(7) "Goods" means all property, including, but not limited to, supplies, equipment, materials, printing, and insurance. "Goods" does not include leases, acquisitions and disposals of real property, which are governed under title 4, chapter 15; and

(8) "Vendor" means a legal entity that has been established by the department of finance and administration's division of accounts as a vendor through proper authority for which payment may be made by the state.

§ 4-\_\_-102.

(a)

(1) There is created a procurement commission of seven (7) ex officio members which shall be composed of the governor, comptroller of the treasury, commissioner of general services, commissioner of finance and administration, speakers of the senate and house of representatives, and a procurement professional member appointed by the governor upon the recommendation of the National Institute of Government Purchasing. The chief procurement officer will serve as a non-voting member.

(2) The governor shall serve as chair and the commission shall elect from its membership a vice chair and secretary.

(b) The attorney general and reporter shall serve as legal counsel to the commission in accordance with the requirements of § 8-6-301.

(c) In the event the voting membership of any ex officio members is found by a court of competent jurisdiction to be unconstitutional or invalid, the members shall continue as ex officio non-voting members, and in addition, the senate and house of representatives shall by joint resolution appoint other persons to be voting members.

(d) All members shall serve as their official role provides, except the procurement professional member shall serve a five-year term.

4-\_\_-103.

(a) The commission has the power and authority, except as otherwise provided in this chapter, to prescribe standards, policies and procedures, and to promulgate rules and regulations to be followed consistent with this chapter, governing the procurement, contracting, management, control, and disposal of any and all goods and services by the state.

(b) The members of the commission shall serve without additional compensation, but shall be entitled to reimbursement for their necessary expenses. All reimbursement for travel expenses shall be in accordance with the comprehensive travel regulations as promulgated by the department of finance and administration and approved by the attorney general and reporter.

(c) The commission shall not exercise authority over the award or administration of any particular contract, but shall have authority to hear protests related to the procurement process for adherence to procurement standards, policies, rules, regulations, procedures and guidelines.

4-\_\_-104.

(a) There is created a procurement office headed by the chief procurement officer. This Office shall be administratively attached to the department of general services, but responsible to the state procurement commission.

(b) The commission shall appoint the chief procurement officer, who shall be a person qualified by training and relevant and recent experience in public procurement and in the large-scale procurement of goods and services, contract administration and

control, and demonstrated executive and organizational ability to perform the duties of this office.

(c) The chief procurement officer shall be a full-time public official of the state as an executive service employee appointed to serve a five-year term and may be removed from office by the commission. The commission shall fix the salary of the chief procurement officer.

(d) The chief procurement officer is authorized to employ such personnel as are necessary to carry out the purposes of this chapter upon the approval of the commission. The compensation of employees of the commission shall be fixed by the commission within the limitations of such amounts as may be appropriated by the general assembly for that purpose.

(e) Subject to the provisions of this chapter and other procurement laws under the jurisdiction of the chief procurement office, the chief procurement officer may adopt operational procedures governing the internal functions of the procurement office.

4-\_\_-105.

Under the direction of the commission, the chief procurement officer has the power and duty to:

(1) Develop the standards, policies, and procedures, and promulgate rules and regulations in accordance with title 12 governing the procurement, contract, management, control, and disposal of any and all goods and services by the state and other standards and guidelines prescribed by the commission;

(2) Delegate authority with the approval of the comptroller of the treasury to designees or to any department, agency, or official as prescribed in standards, policies, rules, regulations and procedures approved by the commission;

(3) Establish a central procurement management office that administers and monitors procurements for adherence to prescribed standards, policies, rules, regulations and procedures and provides agencies with training, guidance, technology and human resources for the coordination, processing and monitoring of the procurement process. This office will identify opportunities for sharing similar goods and services;

(4) Establish a central contract management office that administers and monitors contracts for adherence to prescribed standards, policies, rules, regulations and procedures and provides agencies training, guidance, technology and human resources for the coordination, processing and monitoring of contracts;

(5) Establish a central grant management office that administers and monitors grants for adherence to prescribed standards, policies, rules, regulations and procedures and provides agencies with training, guidance, technology and human resources for the coordination, processing and monitoring of grants and grant contracts. This office will assist agencies in identifying grant opportunities for the state. This office shall maintain a central database of information regarding grant recipients and sub-recipients for monitoring purposes;

(6) Establish a contract performance management and quality assurance office that administers and monitors procurement and contract performance and agency procurement and contract management performance for adherence to prescribed standards, policies, rules, regulations and procedures and provides agencies with training, guidance, technology and human resources for the coordination, processing and monitoring of procurement and contract performance and agency procurement and contract management performance. This office will assist agencies in identifying risk areas and recommend contract management best practices;

(7) Establish a central bidder and vendor relations management office that administers and maintains the registration of all bidders, vendors, grant recipients and sub-recipients for adherence to prescribed standards, policies, rules, regulations and procedures and provides bidders, vendors, grant recipients and sub-recipients with training, guidance, technology and human resources for the coordination, processing and monitoring of a central bidder and vendor registration database. This office will assist bidders and vendors with technical matters, procurement notification, contract and grant awards, and conducting business with the state;

(8) Conduct training to promote procurement excellence, either independently or in cooperation with other state governments, municipalities or other units of local government, or other persons that fosters professional development and certification. In conducting this training, the chief procurement officer shall:

(A) Prescribe professional and accountability standards and guidelines for procurement, contract, grant, performance and quality assurance management personnel;

(B) Conduct or participate in procurement education and training programs for state and private sector employees;

(C) Conduct research into existing and new methods of procurement;  
and

(D) Establish and maintain a procurement library of education and training courses and technical reference resources.

(9) Effective July 1, 2011, shall establish a single public internet procurement website that will include posting of solicitations; posting of all procurement actions; and resulting established contracts by state agencies, departments and institution.

(10) Carry out all policies, rules and regulations that are adopted by the commission.

(11) Chair the council which shall review and comment on standards, policies, rules, regulations, guidelines and procedures authorized under this chapter; and

(12) Establish and maintain agenda and minutes of the commission and the council and all actions of both which shall be open to public inspection during regular office hours.

4-\_\_-106.

(a)

(1) There is created an advisory council on state procurement. There shall be five (5) voting members of the council. There shall be seven (7) non-voting members of the council representing the bidder and vendor community and other procurement professionals. All members shall have a demonstrable working knowledge of the state procurement process.

(2)

(A) The five (5) voting members of the council shall consist of two (2) representatives of state agencies appointed by the commissioner of general services, one (1) representative from the department of finance and administration, one (1) representative from the office of the comptroller of the treasury, and the chief procurement officer who shall serve as chair.

(B) Voting members representing state agencies appointed by the commissioner of general services shall serve a four-year term, beginning February 1, 2011. These voting members of the council shall, upon the expiration of the member's term, be eligible for reappointment and shall

serve until a successor is appointed. In the event a member resigns or becomes ineligible for service during the member's term, a successor shall be appointed by the appropriate appointing authority to serve the remainder of the term.

(C) Proxy voting is prohibited by voting members of the council; provided, however, that in instances where a voting member will be absent from a vote of the council, the member's appointing authority is authorized to appoint an alternate or designee for the vote.

(3)

(A) Except as provided in subdivision (3)(B), the seven (7) nonvoting members shall be selected to serve staggered four-year terms as follows:

(i) The speaker of the house of representatives, the speaker of the senate, and the governor shall each appoint two (2) representatives, with one (1) representative from the bidder/vendor community and one (1) representative recommended by the National Institute of Government Professionals. The final advisory non-voting member appointment shall be appointed by the chair of the fiscal review committee; and

(ii) The non-voting member appointed by the chair of the fiscal review committee shall serve a two-year term, beginning February 1, 2011 until the term expires January 31, 2013;

(iii) The terms shall be staggered so that the terms of only three (3) non-voting members shall terminate at the same time. The terms of the non-voting members from the bidder and vendor



community and one (1) agency representative appointed by the commissioner of general services, who are serving as of February 1, 2011, shall be amended to expire on January 31, 2013, and the successors shall serve a four-year term to begin February 1, 2013, and to end January 31, 2017. The appointed members as recommended by the National Institute of Government Professionals and the other agency representative appointed by the commissioner of general services shall serve a four-year term that begins February 1, 2011 and shall expire January 31, 2014.

(B) Each non-voting member of the council shall, upon the expiration of the member's term, be eligible for reappointment and shall serve until a successor is appointed. In the event a member resigns or becomes ineligible for service during the member's term, a successor shall be appointed by the appropriate appointing authority to serve the remainder of the term.

(4) No employer shall discriminate in any manner against an employee who serves on the council because of the employee's service. Employees who serve on the council shall not be denied any benefit from their employer because of the employee's service.

(5) Members of the council shall not be paid but may be reimbursed for travel expenses. All reimbursement for travel expenses shall be in accordance with the comprehensive travel regulations promulgated by the department of finance and administration and approved by the attorney general and reporter.

(b) The council shall meet at least twice each year for the discussion of problems and recommendations for improvement of the procurement process or any other matter relevant to procurement as determined by the chief procurement officer.

(c) The council shall review and issue a formal comment approved by the council on procurement policies, standards, guidelines and procedures established by the chief procurement officer prior to being presented for approval by the commission. All reviews and formal comments shall be issued within sixty (60) days of being presented to the council by the chief procurement officer. The formal comments approved by the council shall be provided to the members of the commission, and the chair and vice chair of the fiscal review committee.

(d) When requested by the chief procurement officer, the council may conduct studies, research, analyses, and make reports and recommendations with respect to subjects or matters within the authority and duties of the chief procurement officer. The chief procurement officer may appoint advisory groups to assist in specific areas, and with respect to any other matters within the authority of the chief procurement officer.

(e) In performing its responsibilities, the council's role shall be strictly advisory, but it may do any of the following:

(1) Make recommendations to the governor, general assembly, fiscal review committee, commissioner of general services, commissioner of finance and administration, and comptroller of the treasury relating to the enactment or promulgation of laws or rules;

(2) Make recommendations to the commissioner of general services and commissioner of finance and administration regarding the method and form of statistical data collections; and

(3) Monitor the performance of the chief procurement office in the implementation of legislative directives.

(f) The council may develop evaluations, statistical reports and other information from which the general assembly may evaluate the impact of the legislative changes to procurement laws.

(g) Whenever any bill is introduced in the general assembly proposing to amend this chapter, to make any change in public procurement or contract law, or to make any change in the law that may have a financial or other substantive impact on the administration of public procurement and contract law, the standing committee to which the bill is referred may refer the bill to the council. The council's review of bills relating to procurement and contract law should include, but not be limited to, bills that propose to amend title 4, chapter 30 and title 12. All bills referred to the council shall be reported back to the standing committee to which they were assigned as quickly as reasonably possible. Notwithstanding the absence of a report from the council, the standing committee is free to consider the bill at any time. The chair making the referral shall immediately notify the prime sponsors of the referral and the council shall not review and comment on the proposed legislation until the prime sponsors have been notified. The comments of the council shall describe the potential effects of the proposed legislation on the procurement and contract process and its operations and any other information or suggestions that the council may determine to be helpful for the sponsors, standing committees or general assembly. The comments of the council may include recommendations for or against passage of the proposed legislation. Except for reporting the recommendations for or against passage of proposed legislation and responding to any inquiries made by the members of the general assembly, council staff shall not lobby or advocate for or against passage of proposed legislation.

4-\_\_-107.

The comptroller of the treasury is authorized to examine and approve all procurements, contracts, grants and other documents that serve to incur financial obligations against state government. This authority to examine and approve shall be developed in consultation with the chief procurement officer and set forth in procurement and contract policies, standards, rules, regulations, procedures and guidelines approved by the commission.

4-\_\_-108.

(a) All requests of the procuring agency to procure goods or services by negotiation with a single service provider, referred to in this section as a noncompetitive contract, shall be contemporaneously filed with the fiscal review committee of the general assembly, comptroller of the treasury and the chief procurement officer. Such requests shall document the following:

(1) Description of goods or services to be acquired;

(2) Explanation of the need for or requirement to acquire the goods or services;

(3) Name and address of the proposed contractor's principal owner;

(4) Evidence that the proposed contractor has experience in providing the same or similar goods or services and evidence of the length of time the contractor has provided the same or similar goods or services;

(5) Explanation of whether the goods or services were purchased by the procuring agency in the past, and if so, the method used to purchase the goods or services and the name and address of the contractor;

(6) Description of the procuring agency's efforts to use existing state employees and resources or, in the alternative, to identify reasonable and

competitive procurement alternatives, rather than to use non-competitive negotiation;

(7) Justification of why the goods or services should be acquired through non-competitive negotiation; and

(8) Any additional information that the fiscal review committee may direct the procuring agency to provide that will assist the committee in evaluating the contract;

(b)

(1) The following contracts and contract amendments shall be subject to review by the committee:

(A) Proposed non-competitive contracts with a term of more than one (1) year or which are renewable by either party that would extend the contract beyond twelve (12) months and which have a cumulative value not less than two hundred fifty thousand dollars (\$250,000), including all possible renewals;

(B) Any amendment to a contract described in subdivision (b)(1);and

(C) Any amendment to a contract meeting the term and dollar threshold requirements of subdivision (b)(1)(A), regardless of whether the original contract was procured through competitive or non-competitive means, where the amendment does the following:

(i) Increases or decreases funding and extends or shortens the contract term unless the original contract contained a term extension provision and as long as the additional funding does not increase the amount per compensable increment, or

(ii) Otherwise changes an original or amended contract in a substantive manner.

(2) The contracts subject to review shall include all contracts of the executive branch that otherwise meet the requirements of subdivision (b)(1), including, but not limited, to contracts of higher education, including the board of regents, the University of Tennessee, and the higher education commission. Highway and road improvement contracts reviewed by the department of transportation, contracts reviewed by the building commission and debt issuance contracts reviewed by the comptroller of the treasury shall not be subject to this review.

(3) The committee, pursuant to its jurisdiction under § 3-7-103(a), is authorized to review any other state contract or contract amendment in accordance with the procedures established in this section without regard to whether the contract or contract amendment meets the requirements of subdivision (b)(1).

(4) The fiscal review committee shall have twenty (20) business days from receipt of the request as provided in this section to comment on the proposed contract. After this twenty-day period, any such contract authorized by the chief procurement officer may be executed. All other requests to negotiate non-competitive contracts shall be reviewed by the fiscal review committee after approval by the chief procurement officer. With respect to such requests, the fiscal review committee shall be provided the same information to be submitted in accordance with subsection (a). The chair or the chair's designee, after consultation with the comptroller of the treasury, shall have authority to waive the twenty-day period for comment and authorize the chief procurement officer to

execute contracts or amendments that are determined to be in the best interests of the state, and to proceed with reporting and comment by the committee at their next scheduled meeting.

(c) All requests, approved in accordance with rules authorized by subdivision (a)(1), to permit an exception to the rules shall be filed with the fiscal review committee.

(d) The procurement office shall file a personal, professional, and consultant service contract report quarterly with the fiscal review committee. The report shall list contracts approved in accordance with rules authorized by § 4-\_\_\_-103(a) during the prior quarter and detail whether each contract procurement was competitive.

(e) Each procuring agency granted a special delegated authority, pursuant to rules authorized by § 4-\_\_\_-103(a), to establish fee-for-service contracts shall report to the fiscal review committee a list of all contracts awarded under the delegated authority. The list of contracts awarded shall be filed quarterly and shall include the contractor name, contract period, contract amount, method used to select the contractor, and completion date for a monitoring review, as defined by any applicable policy developed by the department of finance and administration, and any other information the procuring agency wishes to include.

(f) The department of transportation shall report to the committee on highway and road improvement contracts it has approved that would otherwise meet the requirements of subdivision (b)(1) within thirty (30) days of approval, including all of the information specified in subsection (a) and any other information the committee deems necessary or helpful. The committee shall have the option to conduct a separate hearing on highway and road improvement contracts approved by the department of transportation.

(g) The State building commission shall report to the committee on contracts it has approved that would otherwise meet the requirements of subdivision (b)(1) within thirty (30) days of approval, including all of the information specified in subsection (a) and any other information the committee deems necessary or helpful. The committee shall have the option to conduct a separate hearing on contracts approved by the building commission.

4-\_\_-109.

(a) The provisions of this act supplement, but shall not supersede other provisions of law.

(b)

(1) No public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract except as provided in this section, or as otherwise allowed by law.

(2) No public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the public body when the employee knows that:

(A) The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction;

(B) The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent;



(C) The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or

(D) The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

(3) A public officer or employee who will derive a direct benefit from a contract with the public agency he or she serves, but who is not involved in making or administering the contract, shall not attempt to influence any other person who is involved in making or administering the contract.

(4) No public officer or employee may solicit or receive any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves.

4-\_\_ -110

(a) No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the public body unless the employee or former employee provides written notification to the public body, or a public official if designated by the public body, or both, prior to commencement of employment by that bidder, offeror or contractor.

(b) Participation in bid preparation; limitation on submitting bid for same procurement. No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall

(1) Submit a bid or proposal for that procurement or any portion thereof or;

(2) Disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body.

(c)

(1) No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.

(2) No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.

(3) No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.

(4) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the public body and shall be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

(d) Anyone violating this section shall be guilty of a Class 1 misdemeanor.

(e) A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when:

(i) immediate termination would result in harm to the public health or welfare, and

(ii) the continuation is approved by the state procurement commission.

Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare.

(f) For purposes of this section:

(1) As used in this section, the term "public officer" means an individual who is elected or appointed to serve or represent a public agency, other than an employee or independent contractor of a public agency.

(2) A public officer or employee is involved in administering a contract if he or she oversees the performance of the contract or has authority to make decisions regarding the contract or to interpret the contract.

(3) A public officer or employee is involved in making a contract if he or she participates in the development of specifications or terms or in the preparation or award of the contract. A public officer is also involved in making a contract if the board, commission, or other body of which he or she is a member takes action on the contract, whether or not the public officer actually participates in that action, unless the contract is approved under an exception to this section under which the public officer is allowed to benefit and is prohibited from voting.

(4) A public officer or employee derives a direct benefit from a contract if the person or his or her spouse:

(i) has more than a ten percent (10%) ownership or other interest in an entity that is a party to the contract;

(ii) derives any income or commission directly from the contract;

or

(iii) acquires property under the contract.

(5) A public officer or employee is not involved in making or administering a contract solely because of the performance of ministerial duties related to the contract.

SECTION 2. This act shall take effect February 1, 2011, the public welfare requiring it.